Supreme Court, U.S.
FILED

No. 95-223 AUG 7 1995

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

*William G. Sweeny, III
SWEENY, WINGATE, MURPHY & BARROW, P.A.
1301 Gervais Street, Suite 500
NationsBank Tower
Columbia, SC 29201
(803) 256-2233

Counsel of Record for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

7H PP

QUESTIONS PRESENTED

1. Did the South Carolina Court of Appeals err in holding that the award of punitive damages in this case met the requirements for due process embodied in the United States Constitution, where

(a) the court allowed the imposition of punitive damages based on a cause of action which OSCO had not elected when required to elect its remedy, and

(b) OSCO was allowed, over objection, to introduce evidence of how much money Cincinnati Insurance Company made during the 10 days the jury was required to be present; the annual investment income of the insurance company; the total assets of the company; and the "surplus" of assets over liabilities; and

(c) the trial court allowed an award of punitive damages against a Defendant whose liability was solely vicarious, when OSCO dropped any claim for punitive damages against

the local agent who was directly liable for the negligence; and

(d) there was no evidence of reckless or other wrongful conduct in connection with the allegation that Defendants failed to procure the correct insurance for OSCO; and

(e) there was no meaningful review by any appellate court?

2. Did the South Carolina Court of Appeals err in failing to grant Defendants a new trial, and thereby deny Cincinnati's right to due process under the United States Constitution, when the jury's verdict was the product of passion, caprice, bias, or prejudice as reflected by:

(a) the inconsistency of the jury's verdict, and

(b) an actual damages award by the jury that far exceeded the evidence, and

(c) counsel for OSCO being allowed to inflame the community-versus-out-of-state-insurance-company passions of the jury?

LIST OF PARTIES

Orangeburg Sausage Company (closely held corporation)	Plaintiff
R. F. Bryant and Son, Inc. (closely held corporation)	Defendant
Cincinnati Insurance Company Cincinnati is itself a wholly owned subsidiary of the Cincinnati Financial Corporation a publicly-held corporation whose shares are traded on the NASDAQ. Cincinnati Insurance Company has no non-wholly owned subsidiaries.	Defendant

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

SUMMARY 3

THE CASE 9

PROCEEDINGS BELOW 30

ARGUMENTS 32

I. The South Carolina Court of Appeals Erred in Holding that the Award of Punitive Damages Met the Requirements for Due Process Embodied in the United States Constitution, where 34

A. the Court Allowed the Imposition of Punitive Damages Based on a Cause of Action Which OSCO Had Not Elected When Required to Elect Its Remedy 35

B. OSCO was Allowed, Over Objection, to Introduce Evidence of How Much Money Cincinnati Insurance Company Made During the Ten Days the Jury Was Required to be Present; the Annual Investment Income of the Insurance Company; the Total Assets of the Company; and the "Surplus" of Assets Over Liabilities 41

C. the Trial Court Allowed an Award of Punitive Damages Against a Defendant Whose Liability was Solely Vicarious, When OSCO, Prior to Sending the Matter to the Jury, Dropped any Claim for Punitive Damages Against the Local Agent Who was Directly Liable for the Negligence 45

D. there was no Evidence of Recklessness or Knowingly Wrongful Conduct in Connection with the Allegation that Cincinnati and Bryant Failed to Procure the Correct Insurance for OSCO . . . 49

E. the South Carolina Appellate Courts Have Failed to Conduct a Meaningful Review of the Punitive Damages Award 54

II. The South Carolina Court of Appeals Denied Petitioner's Right to Due Process Under the United States Constitution by Failing to Grant a New Trial When the Jury's Verdict was the Product of Passion, Caprice, Bias, or Prejudice as Reflected by 58

A. the Inconsistency of the Jury's Verdict 58

B. an Actual Damages Award that Far Exceeded the Evidence 59

C. OSCO's Counsel Being Allowed to Inflame the Community-Versus-Out-Of-State-Insurance-Company Passions of the Jury 62

CONCLUSION 64

TABLE OF AUTHORITIES

Page(s)

Allstate Ins. Co. v. Durham, 431 S.E.2d 557 (S.C. 1993) . 60

Boddie v. Connecticut, 401 U.S. 371 (1971) 33

Dowling v. Home Buyer's Warranty Corp., 428 S.E.2d 709 (S.C. 1993) 35

Fabrigas v. Mostyn, 2 Black.W.926, 96 Eng. Rep. 549 (C.P. 1773) 33

Folkens v. Hunt, 387 S.E.2d 265 (S.C. 1990) 56

Fontaine v. Peitz, 354 S.E.2d 565 (S.C. 1987) 55

Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) 55

Holt v. Virginia, 381 U.S. 131 (1965) 32

Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994) 33, 34, 40, 42, 44, 54, 63, 64

Johnson v. Parker, 303 S.E.2d 95 (S.C. 1983) 59

Norris v. Ferre, 432 S.E.2d 491 (S.C. Ct. App. 1993) . . . 63

O'Neal v. Bowles, 431 S.E.2d 555 (S.C. 1993) 60

Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (S.C. Ct. App. 1994), cert. denied 2, 32

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 45, 46, 47, 54, 57, 63

Peters v. Bain, 133 U.S. 670 (1890) 39

Poston v. National Fidelity Life Ins. Co., 399 S.E.2d 770 (S.C. 1990) 41

Prego v. Hobart, 336 S.E.2d 725 (S.C. Ct. App. 1985) . . . 59

Renney v. Dobbs House, 274 S.E.2d 290 (S.C. 1981) . . . 56

South Carolina State Highway Dep't v. Clarkson, 226 S.E.2d 696 (S.C. 1976) 56

South Carolina Dep't of Highways and Pub. Transp. v. Mooneyham, 269 S.E.2d 329 (S.C. 1980) 56, 57

State v. Duncan, 238 S.E.2d 204 (S.C. 1977) 60

Thompson v. Watts, 316 S.E.2d 393 (S.C. 1984) 39

Thorne v. Contee, 565 A.2d 102 (Md. Ct. App. 1989) cert. denied, 569 A.2d 643 35

Tumey v. Ohio, 273 U.S. 510 (1927) 40

TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711, (1993) 52

United States v. Oregon Lumber Co., 260 U.S. 290 (1922) 39

OTHER AUTHORITIES

Constitution of the United States, Amendment XIV 3, 29

28 U.S.C. § 1257 3

South Carolina Rules of Civil Procedure Rule 59(e) 31

South Carolina Rules of Civil Procedure Rule 60(a) 31

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CINCINNATI INSURANCE CO.,

Petitioner

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

The Petitioner, Cincinnati Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment of the South Carolina Court of Appeals entered in this proceeding on September 6, 1994, rehearing denied November 6, 1994, for

which Petitioner's timely filed petition for writ of certiorari to the South Carolina Supreme Court was denied on May 9, 1995.

OPINIONS BELOW

The South Carolina Court of Appeals' opinion in this matter, Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (S.C. Ct. App. 1994) and the South Carolina Supreme Court's Order denying certiorari, entered May 9, 1995, are set forth in the Appendix hereto ("App.") at pp. 1-42.

The Order of the trial court, entered May 26, 1992, denying Cincinnati Insurance Company's relevant post-trial motions is at App. pp. 43-86.

JURISDICTION

The judgment of the South Carolina Court of Appeals was entered on September 6, 1994. The Petitioner's timely filed petition for certiorari to the South Carolina Supreme Court was denied on May 9, 1995. (App. at 41). This petition is being filed within ninety (90) days of that date. This court's jurisdiction is

invoked under 28 U.S.C. § 1257. Petitioner has received a final judgment from the highest court of South Carolina from which judgment could be had and petitions this Court based on rights claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision involved in this case is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

SUMMARY

This is a case in which a local jury rendered a verdict against an out-of-state insurance company in favor of a local employer that was clearly the result of passion and prejudice. The

courts of South Carolina, trial and appellate, have failed to restrain this outpouring of passion and prejudice, even going to the extreme of abandoning existing precedent and refusing to apply fundamental and standard safeguards against such excess. As a result, the Petitioner, Defendant below, Cincinnati Insurance Company ("Cincinnati"), has been stripped of its property contrary to the due process guaranteed by the United States Constitution.

From the outset, the case was factually and legally confusing because the court permitted the Plaintiff, Orangeburg Sausage Company ("OSCO"), to proceed simultaneously on theories of liability that were stipulated to be mutually exclusive of one another. As a result, evidence and allegations which were not relevant to the cause of action eventually elected were heard by the jury. This obviously confused the jury, which found against Cincinnati on all causes of action even though they were mutually exclusive. Even worse, the trial and appellate courts chose to sustain the punitive damages award on factual and legal grounds

relevant solely to an unelected cause of action. In this way, the trial and appellate courts not only ratified the jury's confusion and prejudice, but formalized it in direct opposition to clear standards mandated by the rulings of this Honorable Court.

On September 22, 1989, Hurricane Hugo damaged OSCO's property. A policy of insurance had been obtained by the Co-Defendant, R. F. Bryant & Son, ("Bryant"), an independent insurance agency, fifteen months prior to the loss and tendered to OSCO's vice president in charge of insurance. The policy called for different coverage limits on OSCO's various covered properties. Three months prior to the loss, Cincinnati submitted a bill reciting again the coverage provided for the scheduled properties, which OSCO paid. Four months after the loss occurred, OSCO claimed for the first time that the declarations page of its policy was faulty in that one of the insured addresses was inaccurately listed as "488 High Street." A dispute arose as to what this "mistake" meant in terms of the coverage limits for

some of OSCO's property, and this lawsuit ensued.

OSCO brought suit against Cincinnati and local independent agent Bryant setting forth three legal causes of action: (1) breach of the existing insurance contract by Cincinnati; (2) bad faith failure by Cincinnati to pay the claim as allegedly required by the existing policy; or (3) if there was no coverage under the policy, then, in the alternative, negligence by the agent Bryant in obtaining a policy with the wrong property description and limits. It was stipulated that the negligence cause of action referred solely to acts or omissions of Bryant and that Cincinnati's liability for that cause of action was strictly derivative of Bryant's actions.

The trial was bifurcated between actual and punitive damages. At the conclusion of the actual damages phase, the jury returned an award of $254,029.23 on the breach of contract claim, $250,000.00 on the bad faith cause of action, and $800,000.00 on the negligent procurement claim. The verdicts were inconsistent in that there could not logically be liability premised on having a

proper contract (breach of contract and bad faith) and on not having a proper contract (negligent procurement). The award of $800,000.00 for the negligence cause of action far exceeded any amount suggested by the evidence.

After the actual damages phase, the trial court required OSCO to elect its remedy. OSCO chose negligence and chose to proceed only against Cincinnati for punitive damages, dismissing any such claims against the local agent even though his acts alone constituted the negligence for which OSCO sought recovery.

The jury returned a punitive damages award of $1,630,000.00 against Cincinnati even though there was no evidence in the record that Cincinnati (or for that matter, Bryant) had done anything reckless or intentionally harmful. Subsequently, the trial and appellate courts sustained the verdict for punitive damages, but did so based solely on the unelected, and previously abandoned, bad faith allegations. Indeed, the appellate court went so far as to inexplicably deviate from standard appellate practice

by permitting OSCO to claim, over objection, the entire transcript as its record on appeal even though more than 75 percent of the total transcript is completely irrelevant to the negligence cause of action elected. Significantly, OSCO's brief begins with the words "this is a bad faith action" and the appellate courts have used this as a departure point to mischaracterize OSCO's appropriate means of recovery.

Moreover, the trial court permitted OSCO to present extensive financial information about Cincinnati designed to elicit the passion and bias of the jury. An "expert's" testimony was presented to focus the jury's attention on Cincinnati's earnings for the ten days during which the jury heard the case in cramped, uncomfortable surroundings which were then being aggressively renovated. The total damages awarded by the jury was $2,934,029.23, a close approximation of the $2,960,610.00 suggested by OSCO's witness as Cincinnati's earnings over the ten day period. (R. at 966).

THE CASE

In July of 1988, OSCO obtained a commercial insurance policy with Cincinnati through independent insurance agent Bryant in order to cover specific buildings and contents at certain separate locations. On September 22, 1989, OSCO sustained damage to some of its buildings and contents as a result of Hurricane Hugo. After OSCO made a claim, a dispute arose between the parties as to how much coverage the policy should have provided at these separate locations. Cincinnati maintained that OSCO's recovery was limited to the amounts recited in the policy for the specified addresses. OSCO sued, alleging breach of contract and bad faith, or, in the alternative, that independent agent Bryant had negligently and recklessly procured a policy which recited incorrect coverage limits on the scheduled property.

OSCO is a multi-million dollar family business engaged in the manufacture, processing and distribution of food products, located in Orangeburg, South Carolina, the same town in which

the trial was conducted. (R. at 437-39). Its owners have operated the business for a considerable period of time, and they are experienced business people. One of the owners, a vice-president, was specifically charged with obtaining and maintaining insurance for the corporation (R. at 370).

Bryant is an independent insurance agent in Orangeburg (R. at 613-14, 678). He sells insurance from eight companies. (R. at 678-79). He is not an employee of Cincinnati and is compensated only by commission. (R. at 613). During his several contacts with OSCO's officers, Bryant never even indicated which insurance company's policy he would use. OSCO did not request coverage with a specific company. (R. at 384-5). OSCO purchased life, health, workers' compensation and other insurance from various agents other than Bryant. (R. at 383). OSCO has never contended that agent Bryant has ever made any misrepresentations concerning the policy or its coverage limits. (R. at 45-46).

The commercial insurance policy that is the subject of this lawsuit was issued on July 1, 1988, upon the expiration of a prior policy. (R. at 360, 1019). It was understood by all parties before issuance that this new policy would need to reflect new coverage limits on more than one piece of scheduled property. (R. at 374-79). As usual, these limitations of coverage are recited in the declarations page of the policy. (R. at 1024).

OSCO received this policy in July of 1988, but its owners and managers never read the policy or the declarations page. No one from OSCO ever complained about the policy or pointed out any alleged errors prior to the Hugo loss. (R. at 480, 613).

In July of 1989 the policy came up for renewal A billing statement was sent to OSCO clearly delineating and repeating precisely the coverages depicted on the declarations page, showing the same scheduled addresses and their respective coverage limits, as had been done in 1986, 1987, and 1988. (R. at 1366, 1368, and 1370). OSCO paid the bill without any question, comment or

complaint. (R. at 360).

On September 22, 1989, nearly fifteen months after the issuance of the policy, and only three months after paying the amounts called for in the billing statement, OSCO sustained damage to food items stored in various facilities due to Hurricane Hugo and sought to recover monies from Cincinnati under the policy. (R. at 269, 274-76). Prior to this alleged loss, OSCO had never read its policy or questioned it in any way. (R. 373, 396, 468). OSCO knew, however, that it was underinsured as the day after Hugo one of the principals of OSCO called Bryant to increase its property damage limits retrospectively. (R. at 362, 386).

The policy issued clearly calls for scheduled insurance coverage at three separate locations. (R. at 1024). Four months after the hurricane, OSCO, for the first time, stated that one of the scheduled locations - 488 High Street - had never existed. Bryant and Cincinnati maintained that this is the location of OSCO's freezer building where OSCO allegedly sustained its greatest loss,

and all the experts who testified in the case agreed that this is the only reasonable way to construe the policy as it is written. (R. at 344-52, 430-33).

OSCO asserted that the policy, as written, did not reflect its request for coverage limits. (R. at 414-15, 442). The Defendants said it did. OSCO asserted that it had wanted $200,000 more coverage on the freezer building contents than is shown for 488 High Street on the declarations page. OSCO also asserted that the policy should not have had a coinsurance provision. The coinsurance provision was clearly stated in the declarations page, and had been a part of all of OSCO's policies since 1983. (R. at 991). Its policy at the time of trial, in fact, included a coinsurance provision. (R. at 470-71). All of the alleged "defects" in the policy were located in the declarations page of the policy itself and on the face of the periodic billing statement right next to the amount of premium due, which OSCO paid.

Because of the widespread damage caused by Hugo, Cincinnati sent emergency adjusters to OSCO to investigate its damage claim. Interestingly, all of Cincinnati's adjusters encountered only one other Hugo-related grievance by an insured throughout the entire state, a complaint to the State Insurance Department which was settled. (R. at 139). However, at OSCO, a coverage dispute arose due to OSCO's initial claim that its losses were the result of an off-premises power outage. When the claims adjuster informed OSCO's principals that the policy provided no coverage for off-premises power outages, he was cursed and acrimoniously told to get off their property.

Cincinnati nonetheless accepted OSCO's revised version of how its loss occurred and continued to adjust the claim. After the adjuster apportioned the loss by scheduled location, another conflict arose when, for the first time, OSCO revealed that "488 High Street" was a nonexistent address and that it objected to any of the loss being allocated to this location and to the

implementation of the coinsurance clause.

On July 12, 1990, OSCO filed and served its Summons and Complaint. The first cause of action was against Cincinnati alone and alleged breach of contract for failure to enforce the policy by providing the additional $200,000 contents coverage to which OSCO asserted it was entitled. (R. at 43-44). This cause of action presumes an enforceable contract with the policy limits advocated by OSCO. The second cause of action was against Cincinnati alone for the bad faith failure to pay under the policy the amounts OSCO alleged were due. It was stipulated by counsel that this cause of action was derivative of the breach of contract action and could not be sustained absent a finding of breach of contract. No independent acts of bad faith beyond failing to pay the amount set forth in the breach of contract action were alleged. Bad faith could not withstand an abandonment of the breach of contract action.

The third cause of action against both Defendants for

negligent procurement presumed there was no enforceable contract that provided the coverages OSCO wanted. OSCO's Complaint states the negligence cause of action as:

FOR A THIRD CAUSE OF ACTION

. . .

18. The Defendants represented to plaintiff that the policy issued by the Defendant Cincinnati would meet those needs. If the policy is found not to cover the plaintiff's losses, plaintiff will suffer $189,865.29 in uncompensated losses that it intended to insure, and that Defendants led it to believe would be insured.

19. If it is determined that the plaintiff's losses were not covered by the insurance policy in question, the defendants were negligent, careless and reckless in the following particulars:

a. in writing an incorrect address in the insurance policy in question;

b. in changing the insurance policy without notice to plaintiff;

c. in writing an insurance policy which failed to meet the plaintiff's stated requests for coverage, while leading the plaintiff to believe that

such needs had been met;

All of which are the direct and proximate cause of the plaintiff's uncompensated losses.

(R. at 45-46). OSCO stipulated that the acts of negligence complained of were solely those of Bryant and that there were no independent acts of negligence alleged against Cincinnati itself. Thus, Cincinnati's liability for negligence was totally derivative of the acts of the independent agent. (R. at 789, 828, 838).

The case came to trial before a jury in Orangeburg, South Carolina, on January 13, 1992. Cincinnati made a pre-trial motion to require OSCO to elect its remedy, given the different theories and different proofs involved. (R. at 242-244). The trial court denied Cincinnati's motion. By agreement, the trial was bifurcated between the claims for actual and punitive damages.

During the course of the actual damages phase of the trial, the court allowed, over Cincinnati's objection, testimony by Mr. Barranco, an "expert" hired by OSCO, as follows:

Q. Do insureds read through their insurance policies?

> A. Normally not. That's universally known throughout the industry, and Mr. Suggs, it is also universally known that the few insureds that do attempt to read their policy are not expected by the people in the industry to understand the policy.

(R. at 303). After the court overruled Cincinnati's objection to such testimony, Mr. Barranco quoted from a book, Insurance Company Operations, and gave commentary on it: "[a]nd to just read the one sentence that applies, it says, 'few insureds bother to read their insurance policies and the policies may spell out duties of which the insured is unaware.' That's well known in the industry, Mr. Suggs." (R. at 305-306). Another "expert" hired by OSCO, a Mr. Siver, testified that people who buy insurance know very little about it and have a very limited ability to be aware of things like coinsurance. (R. at 417).

Such testimony arouses the passion and prejudice of members of the jury against insurance companies. The clearly intended implication is that insurance companies are intentionally taking advantage of ordinary people (like the jurors) who are

helpless to defend themselves.

OSCO's President was also allowed to testify, over Cincinnati's objection, about OSCO's participation in community activities. The testimony was:

> Q. Just briefly; what kind of community activities does OSCO engage in?
>
> A. A variety of activities. We have people to come and ask us to do certain things for different organizations, and of course we're committed to the community. It's a wide variety of community commitment; Voc Hab functions, Bar-B-Que for various organizations, Heart Fund, etc. There's not any way I could list the number of activities that we have participated in for the community.

(R. at 439-40).

In his closing argument, OSCO's counsel built on this testimony and furthered the parochial appeal, the clear intent of which was to excite the prejudice of the jury. He argued that Cincinnati had harmed the whole town of Orangeburg.

> So it's important to OSCO, this case, and the case is important to the community. This is not just

> about OSCO. OSCO was employing 30 people in this community before this happened to them, and now they're not. Thirty jobs have been lost because their claim couldn't get paid. What they paid their premiums for didn't get paid. Now, we're not Michelin; we don't bring in 300 jobs or 3,000 jobs, but every job is important to the community. This case is important to the State because what you do in this case is going to be known to Cincinnati Insurance Company and to every other insurance company.

(R. at 836). At the end of his argument he returned to this Orangeburg versus Cincinnati theme exhorting the jury to "give this community back Orangeburg Sausage Company." (R. at 869).

After counsel's passion-provoking argument, the jury returned an actual damages verdict for OSCO on all three legal causes of action. (R. at 5, 36-37). It awarded $800,000.00 in actual damages on the negligence cause of action, $254,079.73 on the breach of contract cause of action, and $250,000.00 for the bad faith cause of action. (R. at 36-37).

For the jury to return an award of actual damages on the negligence cause of action -- i.e., for <u>not</u> obtaining the contract

OSCO desired -- and on the breach of contract and bad faith causes of action -- i.e., for obtaining but not honoring the contract OSCO desired -- defies logic and reason. Such an internally inconsistent verdict is evidence of passion, bias, or prejudice.

The size of the award for actual damages for negligence is additional evidence of prejudice, passion, or bias. There is no testimony in the record of actual damages in the amount of $800,000. The President of OSCO "estimated" damages of $750,000 (R. at 455), but the trial court later, in granting a remittitur to $595,215, held that there was "little, if anything, to substantiate" the testimony as to $750,000 in damages. (App. at 12). The jury, therefore, awarded actual damages for negligence in an amount far above what the evidence supported.

Immediately after the verdict for actual damages was rendered, Cincinnati moved for a new trial on the basis that the verdict was based on passion, caprice, or prejudice. (R. at 940, 944). Within the ten days allowed by the court for post-trial

motions, Cincinnati moved for a judgment notwithstanding the verdict or, alternatively, for a new trial based on the same grounds. (R. at 61-64, 65, 68, 76, 79-80, 93-96, 101-102, 128-29, 159-161). Cincinnati also recited these grounds in its appeal to the South Carolina appellate courts. (Brief for Appellant Cincinnati at 31-33) (Reply Brief for Cincinnati at 15-17) (Pet. for Rehearing by Cincinnati at 31-33). The issue was likewise presented to the South Carolina Supreme Court in Cincinnati's Petition for Certiorari to that court. (Pet. at 40-42, 44-45).

After the jury returned the actual damages verdict, the court required OSCO to elect its remedy.[1] OSCO elected the negligence cause of action which, as stated in the Complaint, was based on there not being coverage for OSCO's damages under the insurance policy. (R. at 45).

---

[1]Cincinnati had earlier renewed its motion that OSCO be required to elect its remedy, (R. at 513-518), but the court held that OSCO would not be required to make an election until the verdict was returned.

Though OSCO had specifically stated that the cause of action in negligence against Cincinnati was completely derivative of Bryant's conduct, (R. at 789, 828, 838), OSCO released Bryant from any liability for punitive damages prior to the punitive damages phase of the trial. (R. at 490, 946-47, 950-951). Releasing the local agent before the question of punitive damages was presented to the jury was another of OSCO's actions to encourage the jury to direct its bias and prejudice against the vicariously liable, but out-of-state, insurance company.

Despite requiring OSCO to elect its remedy, the trial court failed to limit the jury's consideration to the evidence relevant to the elected remedy. The court thereby allowed punitive damages to be assessed for both the negligence and the bad faith causes of action, (R. at 956-959), even though bad faith was not elected nor consistent with the allegations of negligence. Cincinnati immediately objected to any mingling of the negligence and bad faith actions. (R. at 956-959). Cincinnati again objected right

after the court's charge to the jury, (R. at 975), and specifically objected under Amendment XIV to the United States Constitution. (R. at 975-976). Over Cincinnati's objection, the court allowed the jury to consider irrelevant evidence, which pertained only to the bad faith claim, in considering punitive damages. (R. at 956-959, 968-972). In reviewing and approving the award of punitive damages of $1,630,000, both the trial court (App. at 56) and the South Carolina Court of Appeals (App. at 21-22) cited only actions that were relevant to the unelected bad faith claim. The trial court cited as evidence supporting the punitive damages against Cincinnati the following: disregarding evidence that OSCO's loss was from water damage; refusing to pay the undisputed portions of the claim for eight months; violating portions of its own claims manual; demanding documentation on a piecemeal basis for months after the loss; taking five months to advance the position that the freezer building had only $30,000 in contents coverage; refusing to consider OSCO's very viable position on the incorrect address;

and requiring, as a condition of payment of the undisputed portions of OSCO's claim, a concession on a major dispute concerning the address. (App. at 56-57). A perusal of this proffered justification for punitive damages reveals that none of the cited reasons pertains to allegations surrounding the agent's obtaining the policy. All of the proffered rationale depends on there being an enforceable contract between OSCO and Cincinnati, which directly contradicts OSCO's negligence claim. The review by the South Carolina Court of Appeals is practically a verbatim recasting of the trial court's Order. (App. at 21-22). The actions it cites sustaining an award of punitive damages are the same as those cited by the trial court. Like the trial court, the appeals court cites no actions that allege misconduct or recklessness by Cincinnati in procuring or issuing the policy.

Prior to the punitive damages phase of the trial, Cincinnati moved to strike punitive damages specifically because there was "no evidence of reckless or willful conduct." (R. at 950). After

the jury charge on punitive damages, when the court was seeking any exceptions, additions, or objections, Cincinnati objected on constitutional grounds. (R. at 975-76). In its post-trial motions, Cincinnati reiterated its objection that there was no evidence that would warrant the imposition of punitive damages. (R. at 63, 92, 131). Cincinnati brought the deficiency-of-evidence issue up on appeal, (Brief for Cincinnati at 22-26), and in its petition for certiorari to the South Carolina Supreme Court (Pet. for Cert. for Cincinnati at 30-33).

The trial court allowed OSCO to present to the jury, in the punitive damages phase, extensive financial information about Cincinnati. OSCO was allowed to present, over objection, Cincinnati's total assets; net worth; and, again over objection, annual and daily earnings. (R. at 963-965). The latter information, moreover, was presented in such a way as to invite the jury to respond in anger at their having to spend ten days at the trial. (R. at 953-54; 966). OSCO's counsel implicitly invited the

jury to assess damages against Cincinnati in the amount the company earned during the ten days of trial. The trial had been conducted in a cramped atmosphere during renovations to the courthouse. OSCO's counsel told the court before the testimony that "I'm going to ask [Dr. Wood] to multiply [Cincinnati's daily earnings], by the number of days we've been here at trial." (R. at 953). The court, over Cincinnati's objection, gave its full approval to that prejudicial evidence, as shown from the following extract.

The court:	If the question is will I allow him to multiply -- How many days have we been here?
Mr. Suggs:	Ten
The court:	Ten times that number? Yes, I'll let that go.

(R. at 954). Such evidence can have no purpose except to arouse the anger and resentment of the jury. It certainly is not probative regarding any conduct of Cincinnati that would merit an award of punitive damages.

Within the ten days allowed by the court, Cincinnati made post-trial motions for judgment notwithstanding the verdict or for a new trial (R. at 61-69); to vacate or for a new trial nisi remittitur of actual damages (R. at 126-27); for a post trial review of punitive damages and to vacate or for a new trial nisi remittitur of punitive damages (R. at 131-132). In response to Cincinnati's motions, and similar motions from Co-Defendant Bryant, the trial court, by Order Regarding Post-Trial Motions, (App. at 43-86), granted Defendant's motion for a new trial nisi remittitur as to actual damages and denied all other post-trial motions. Under the court's holding, unless OSCO consented to a reduction in the amount of actual damages for negligence to $596,216, the Defendants would be entitled to a new trial. OSCO did consent to the remittitur.

Cincinnati and Bryant timely appealed the court's Order to the Supreme Court of South Carolina. The case being assigned to the South Carolina Court of Appeals, that court, after briefing by

all parties, heard arguments on October 4, 1993. The appeals court made its decision and issued its opinion on September 6, 1994; it denied Cincinnati's petition for rehearing on November 9, 1994. Cincinnati timely petitioned the South Carolina Supreme Court for certiorari, which petition was denied on May 9, 1995. (App. at 41). This petition followed.

In this petition, Cincinnati is seeking redress under the XIV Amendment to the United States Constitution for violations of its right to due process in the trial and appellate courts. The federal due process issue regarding punitive damages was raised initially in Cincinnati's Amended Answer (R. at 59); repeatedly in the trial court (R. at 950, 956-959, 975-976); in Cincinnati's post-trial motions (R. at 63, 92, 131); and in its state court appeal. (Brief for Cincinnati at 22-26; Pet. for Cert. at 30-33). Cincinnati raised the federal due process issue regarding actual damages right after their imposition (R. at 940, 944), in its post-trial motions (R. at 61-69, 79-80, 101-102, 127, 159-160), and in its state appeal.

(Brief for Cincinnati at 31-33; Reply Brief for Cincinnati at 15-17; Pet. for Cert. for Cincinnati at 31-33).

PROCEEDINGS BELOW

On July 12, 1990, OSCO filed its Complaint in the Court of Common Pleas for the County of Orangeburg, South Carolina. The Complaint was served on Cincinnati by letter to the State Insurance Commissioner on July 23, 1990. Cincinnati filed and served its Answer on September 24, 1990. It filed an Amended Answer on October 19, 1990. The case came to trial in Orangeburg, South Carolina on January 13, 1992. Verdicts as to actual and punitive damages were reached on January 22, 1992.

Defendants on January 31, 1992, filed post-trial Motions for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, to Vacate or for a New Trial Nisi Remittitur of Actual Damages, and for Post-Trial Review of Punitive Damages and to Vacate or for New Trial Nisi Remittitur of Punitive Damages. By Order of May 26, 1992, the trial court granted the

Motion for New Trial Nisi Remittitur as to Actual Damages unless OSCO consented to a remittitur of the actual damages award to $595,216.00. (App. at 43-86). All other post-trial Motions were denied. OSCO consented to the remittitur.

On June 11, 1992, Cincinnati filed a Motion to Reconsider the Order Regarding Post-Trial Motions pursuant to Rules 59(e) and 60(a) of the South Carolina Rules of Civil Procedure. The Motion was denied on June 25, 1992. (R. at 34-35).

Cincinnati's Notice of Intent to Appeal the May 26, 1992 "Order Regarding Post-Trial Motions" and the Order denying the Rule 59(e) and 60(a) Motion was filed on June 29, 1992. Cincinnati filed an Amended Notice of Appeal on June 30, 1992, appealing the verdict dated January 22, 1992, the May 26 "Order Regarding Post-Trial Motions," and the Order denying the Rule 59(e) and 60(a) Motion.

The case was assigned to the South Carolina Court of Appeals. After briefing, oral argument was conducted before that

court on October 4, 1993. The court issued its decision, Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (S.C. Ct. App. 1994), on September 6, 1994. (App. at 1). On September 21, 1994, Cincinnati petitioned the South Carolina Court of Appeals for a Rehearing. The petition was denied on November 9, 1994.

On December 9, 1994, Cincinnati petitioned the South Carolina Supreme Court for a Writ of Certiorari. This petition was denied on May 9, 1995. (App. at 41).

ARGUMENTS

It is a staple of due process jurisprudence that a party to litigation is entitled to fair process. Holt v. Virginia, 381 U.S. 131 (1965) (a fair trial in a fair tribunal is a basic requirement of due process). While precise definition of the process required to meet Constitutional imperatives is elusive, it has been held by this Court that the "state owes to each individual the process which in light of the values of a free society, can be characterized as due."

Boddie v. Connecticut, 401 U.S. 371, 380 (1971). The values of a free society change over time, but one value that has endured for centuries is that damage awards based on passion or prejudice in the jury should not stand. See Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2336-2338 (1994) (survey of cases, including Fabrigas v. Mostyn, 2 Black. W. 926, 96 Eng. Rep. 549 (C.P. 1773), citing judicial review of damages for evidence of prejudice or passion). This Court, moreover, held Oregon's process to be Constitutionally-deficient in large part because there was no provision for judicial review of punitive damages for passion or prejudice. Honda Motor Co. v. Oberg, 114 S. Ct. at 2340-41.

Review by this Court is sought in this case because the State of South Carolina provided process that did not protect an out-of-state insurance company from the intentionally-aroused passion and prejudice of a local jury. This is a case that fulfills the potential, recognized by the court in Honda Motor Co. v. Oberg, that "juries will use their verdicts to express biases against

big businesses, particularly those without strong local presences." 114 S. Ct. at 2341.

In this case a local South Carolina jury vented its anger and bias against an Ohio insurance company in its award of punitive damages and in its award of actual damages. There are numerous indicia that passion and prejudice were involved in the jury's verdicts. The trial and appellate courts of the State failed to intervene to prevent this deprivation of due process. Further, by holding that OSCO could collect punitive damages on the unelected bad faith cause of action, these courts made an error of law that deprived Cincinnati of its Constitutional right to due process.

I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN HOLDING THAT THE AWARD OF PUNITIVE DAMAGES MET THE REQUIREMENTS FOR DUE PROCESS EMBODIED IN THE UNITED STATES CONSTITUTION, WHERE

A. THE COURT ALLOWED THE IMPOSITION OF PUNITIVE DAMAGES BASED ON A CAUSE OF ACTION WHICH OSCO HAD NOT ELECTED WHEN REQUIRED TO ELECT ITS REMEDY.

Having received actual damage verdicts on its three legal causes of action -- breach of contract, bad faith, and negligent procurement -- OSCO was finally required by the court to elect its remedy. OSCO eschewed the breach of contract and bad faith causes of action and selected the negligence remedy. Actual damages were, therefore, awarded only for the negligence cause of action. Stated another way, OSCO was awarded actual damages against Cincinnati and Bryant on its allegations that Bryant had not provided a contract that covered OSCO's losses. Under the common law of South Carolina, for a party to recover punitive damages it must receive actual damages on the same cause of action. Dowling v. Home Buyers Warranty Corp., 428 S.E.2d 709 (S.C. 1993). Courts in other jurisdictions have held similarly. Thorne v. Contee, 565 A.2d 102, 112 (Md. Ct. App. 1989) cert.

denied 569 A.2d 643 ("there must be an award of some compensatory damages under the count wherein punitive damages are claimed before there can be an award of punitive damages thereunder.")

Though OSCO chose the actual damages accruing from Bryant's not obtaining coverage, the court allowed punitive damages based on Cincinnati's alleged bad faith failure to pay under this original contract. Cincinnati is thus held liable for failing to provide the right agreement -- and then punished for its failure to pay under an agreement that did not provide coverage.

That Cincinnati was punished for conduct irrelevant to the negligence cause of action is apparent from the trial and appellate court's reasons recited as the bases for awarding punitive damages and from the Court of Appeals' direct statement that, "Cincinnati contends that, because OSCO elected to recover under its negligence cause of action, the jury should have considered only the evidence supporting the negligence claim during the punitive

damages phase of the trial. We disagree." (App. at 36-37).

In a "Bad Faith" section of its Order denying the post-trial motions, the trial court gives a further explanation of what it considers bad faith, all of which is based on the existence of an enforceable contract providing coverage. The court said:

> The contract listed $230,000 of contents coverage at 597 High Street, the uncontradicted address of OSCO's business and the address which had previously been used to insure the contents of the freezer building. Cincinnati, when it investigated the address issue, confirmed that there was no such address as 488 High Street and that OSCO had never used any address other than 597 High Street. At that point, the evidence may clearly be interpreted to warrant a determination that Cincinnati had no reasonable grounds to continue to insist that the freezer building alone was in fact 488 High Street. Nonetheless, that is the position it steadfastly took.
>
> Further, there is strong evidence that Cincinnati acted unreasonably and in conscious disregard for the rights of OSCO in adjusting the claim, including not only the positions it took, but the delays and methods used. There is abundant evidence that Cincinnati knew early on that it owed the claim, that it changed its position regarding reasons for denying the claim, that it unreasonably delayed payment of undisputed parts of the claim, and that

> its own investigation disclosed no valid reason for denying the claim. In other words, there is abundant evidence of bad faith.

(App. at 70-71). Every element of this discussion, from the word "contract" in the first sentence through the phrase "denying the claim" in the penultimate sentence, is premised on the unelected breach of a valid, enforceable contract.

The court's charges to the jury regarding bad faith, (R. at 895-899), make clear that there must be a valid contract as a prerequisite to a bad faith claim. In citing the elements of such a cause of action, the court cited the first three requirements as:

> (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) a refusal by the insurer to pay benefits under the contract; (3) that that resulted from the insurer's bad faith or unreasonable action and breach of the implied covenant of good faith and fair dealing arising on the contract.

(R. at 896) (emphasis added).

The conclusion is inescapable that the trial and appellate courts of South Carolina have, contrary to their own precedent,

allowed actual damages on one set of facts and one cause of action and punitive damages based on a directly contradictory set of facts and different cause of action.

Allowing such a procedure betrays a lack of understanding regarding the effect of an election of remedies. This Court has stated that:

> Where two inconsistent. . .claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under instrument and then repudiate it.

Peters v. Bain, 133 U.S. 670 (1890); See also, United States v. Oregon Lumber Co., 260 U.S. 290, 294-95 (1922) ("remedies. . .were inconsistent, since the first was founded upon a disaffirmance and the second upon an affirmance of a voidable transaction).

The South Carolina Supreme Court has held similarly in Thompson v. Watts, 316 S.E.2d 393, 395 (S.C. 1984), that:

> Thompson is seeking in one cause of action,

> rescission of the contract of sale and return of his consideration, and in the other, affirmance of the sale and actual and punitive damages, two inconsistent remedies. While we agree Thompson may properly bring suit alleging both a securities violation and common fraud and deceit, he must seek consistent remedies as in Bradley[Bradley v. Hullander, 222 S.E.2d 283 (S.C. 1976)]. Thus, once Thompson pursued his fraud and deceit action, he elected to affirm the contract and is barred now from seeking to repudiate the contract and recover his consideration.(emphasis added).

In the case at hand, in electing the negligence cause of action, OSCO disaffirmed the insurance contract. Allowing OSCO to proceed against Cincinnati for punitive damages on the unelected bad faith cause of action is to affirm the contract. This is contrary to the historic common law and to the specific holdings of this Court and the South Carolina Supreme Court. This Court "has not hesitated to find proceedings violative of due process where a party has been deprived of a well-established common law protection against arbitrary and inaccurate adjudication." Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2333 (1994) citing Tumey v. Ohio, 273 U.S. 510 (1927). Ironically, the state appellate court

ruled that the insurance contract was reasonably ambiguous. Under South Carolina law, had OSCO sought its remedy for bad faith failure to pay insurance benefits, this alleged ambiguity would have barred recovery. Poston v. National Fidelity Life Ins. Co., 399 S.E.2d 770 (S.C. 1990). However, when unfettered by the law of bad faith and simply floating free as "matters to be considered," the South Carolina court has permitted a recovery for bad faith actions, though not elected, which would have been barred had the bad faith cause of action been elected.

B. OSCE WAS ALLOWED, OVER OBJECTION, TO INTRODUCE EVIDENCE OF HOW MUCH MONEY CINCINNATI INSURANCE COMPANY MADE DURING THE TEN DAYS THE JURY WAS REQUIRED TO BE PRESENT; THE ANNUAL INVESTMENT INCOME OF THE INSURANCE COMPANY; THE TOTAL ASSETS OF THE COMPANY; AND THE "SURPLUS" OF ASSETS OVER LIABILITIES.

This Court has recognized that the "presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses,

particularly those without strong local presences." Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2340-41 (1994). In this case, the only testimony presented in the punitive damages phase of the trial was directed at the financial position of Cincinnati. The singular focus of the punitive damages phase was, therefore, solely on the wealth of Cincinnati. OSCO asked its "financial expert," Dr. Wood, to "multiply [Cincinnati's daily earnings] by the number of days we've been here at trial," (R. at 953-54, 965-66), over the objection of Cincinnati that such testimony was prejudicial.

At the time this testimony was allowed, the court and the parties knew the jury was tired and growing impatient at still being in court. At 6:00 p.m. on Friday, January 22, 1992, when the jury was brought back into the courtroom after the argument before the court about Dr. Wood's testimony, the court said to the jury, "Ladies and gentlemen, the proceeding is not [quite] over... [D]on't worry; we're not going another ten days." (R. at 960).

After Dr. Wood testified but before the verdict form was

sent back to the jury, Cincinnati moved for a mistrial as to punitive damages because of this testimony in the context of the jury's exhaustion. The following colloquy occurred:

> Mr. Sweeny: . . .we move for a mistrial in regard to punitive damages on the grounds of the prejudicial question about the ten days we've been here in trial. I think it's obvious to all of us that the jury is very tired. It's after six o'clock on the tenth day of trial. One of the jurors actually bumped his head against the panel when he heard he might have to spend another ten minutes here.
>
> The court: I think he's been doing that since day five, Mr. Sweeny.

(R. at 976-77).

The jury returned its punitive damages award at 7:00 p.m. on Friday, January 22, 1992. (R. at 978). Thus, in less than an hour OSCO presented Dr. Wood's testimony; the court instructed the jury regarding punitive damages; the court considered objections to the charges on punitive damages; and the jury deliberated such damages. In the atmosphere of impatience and the jury's apparent exhaustion, the testimony regarding

Cincinnati's ten-day earnings was particularly prejudicial. Such testimony could have no purpose or effect other than to arouse invidious emotions.

OSCO was also allowed to introduce Dr. Wood's testimony as to Cincinnati's total assets, including a chart displaying the figures, for the years 1989 and 1990, (R. at 963-64); the "surplus" of the Company, or its net worth, (R. at 964-65); and the net annual investment income for 1989 and 1990, (R. at 965). The sums in each case were large: total assets in 1989 and 1990, respectively, of $1,597,872,875 and $1,660,107,922; "surplus" in 1989 and 1990, respectively, of $494,000,000 and $476,000,000; and net investment income in the same two years of $92,012,974 and $108,062,277. These large figures and the repeated recitation of them were intended to prejudice the Orangeburg jury against the big Ohio insurance company, which was without a strong local presence. The potential for bias through such testimony, recognized in Honda Motor Co. v. Oberg, 114 S.Ct. at 2340-41,

came to full bloom here. This South Carolina Plaintiff did indeed "enjoy a windfall because [it had] the good fortune to have a defendant with a deep pocket." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991).

C. THE TRIAL COURT ALLOWED AN AWARD OF PUNITIVE DAMAGES AGAINST A DEFENDANT WHOSE LIABILITY WAS SOLELY VICARIOUS, WHEN THE PLAINTIFF, PRIOR TO SENDING THE MATTER TO THE JURY, DROPPED ANY CLAIM FOR PUNITIVE DAMAGES AGAINST THE LOCAL AGENT WHO WAS DIRECTLY LIABLE FOR THE NEGLIGENCE.

OSCO stipulated that its negligence claim against Cincinnati was completely derivative of its claim against the agent, Bryant. (R. at 789, 828, 838). OSCO thereby conceded that any liability that Cincinnati had was strictly vicarious.

In Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, (1991), this Court held that the award of punitive damages based on vicarious liability is not per se unconstitutional. In Haslip, Lemmie C. Ruffin, Jr., while acting as an agent for Pacific Mutual

Life Insurance Company ("Pacific Mutual") intentionally defrauded four employees of Roosevelt City, an Alabama municipality, one of whom was Cleopatra Haslip. The four employees filed suit against Ruffin, individually and as a proprietorship, and Pacific Mutual. At trial, the jury returned a general verdict for Haslip of $1,040,000, at least $840,000 was probably for punitive damages. Haslip, 499 U.S. at 7, n. 2. The jury's verdict for punitive damages was directed at both the agent, Ruffin, and Pacific Mutual. Pacific Mutual appealed the punitive damages award through the Alabama courts and to this Court, which affirmed the award.

The key difference between Haslip and the case at hand is that in Haslip the directly liable tortfeasor was held liable for punitive damages along with the insurance company. Here the sole direct tortfeasor, Bryant, was released by OSCO from any liability for punitive damages before the case was turned over to the jury. (R. at 490, 813). Thus, the case was directed solely at

the big, out-of-state insurance company during the punitive damages phase of the trial.

By releasing the sole actual tortfeasor from any possibility of liability for punitive damages, and then holding the purely vicarious tortfeasor liable for very large punitive damages, the concept upon which punitive damages are based is turned on its head. The jury charge approved by this Court in Haslip stated the purpose of punitive damages as "'to punish the defendant' and 'for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future.'" 499 U.S. at 19.

The punitive damages in the case at hand do not punish the only wrongdoer, as the only basis for liability was Bryant's inserting an incorrect address in an application for insurance. It is very hard to visualize how an insurance company in Ohio could supervise an independent agent in Orangeburg, South Carolina, such as to preclude inaccuracies in local addresses in South

Carolina. It is equally difficult to conceive how South Carolina can impose essentially a criminal penalty on an Ohio insurance company when it has provided an insurance policy as requested by a South Carolina agent.

The deterrent function of punitive damages similarly fails in this situation. No insurance company can possibly be deterred from inserting an incorrect address in a policy as the issuing company is completely dependent upon the information provided by local agents. There is, moreover, no evidence that Bryant inserted the incorrect address in the policy either intentionally, willfully, or recklessly. If Bryant, the responsible party, could not be held liable for punitive damages in this case, Cincinnati should similarly not be held liable for such damages when Cincinnati's liability for negligence is completely derivative of Bryant's. Such an award is at best arbitrary and capricious and at worst is the intended result of bias created against an out-of-state insurance company.

D. THERE WAS NO EVIDENCE OF RECKLESS OR KNOWINGLY WRONGFUL CONDUCT IN CONNECTION WITH THE ALLEGATION THAT CINCINNATI AND BRYANT FAILED TO PROCURE THE CORRECT INSURANCE FOR OSCO.

The trial and appellate courts have consistently failed to appreciate the implications of OSCO's election of its negligence remedy. OSCO's claim in negligence is stated conclusively in its unamended Complaint, as recited supra, p. 16. OSCO's negligence cause of action unequivocally and clearly claims that Cincinnati and Bryant failed to provide a contract of insurance that provided coverage. Given OSCO's election, it has received an award of actual damages that accrue from Bryant and Cincinnati failing to provide the requisite insurance.

If punitive damages are to be assessed against Cincinnati, they must be assessed for conduct related to and consistent with a failure to provide the requisite coverage. That is not what the trial court did; it allowed the jury to "evaluate the conduct," (R. at 959, 968-972), without reference to any specific cause of action. The

"conduct" that the court allowed to be punished was, therefore, simply free-floating, dissociated from any specific cause of action. The jury was thereby allowed to punish Cincinnati for failing to settle under the contract -- after they have been assessed actual damages for not providing this contract. If OSCO had been required to elect its remedy earlier, as Cincinnati requested, none of the irrelevant evidence would have been admissible. Having knowingly allowed evidence irrelevant to the negligence claim to come in for the duration of the trial, the trial court was under an obligation, sV sponte, after the election, to limit the jury's consideration to the evidence relevant to the elected remedy. Cincinnati did attempt to have the court limit consideration to matters that did not derive from the contract, (R. at 958-59), but the court declined to do so.

Considering punitive damages on the negligence cause of action alone, as the trial court should have done, the record is devoid of evidence that Cincinnati or Bryant acted recklessly,

willfully, or intentionally in failing to obtain proper insurance. OSCO's counsel's closing argument did not recite a single reckless or willfully malicious act by Bryant or Cincinnati regarding the procurement of insurance. (R. at 834-869). The trial court's Order denying the Post-Trial Motions similarly fails to recite any reckless or malicious conduct associated with the negligence cause of action. (App. at 43-86). The South Carolina Court of Appeals' opinion simply repeats the trial court's findings. (App. at 1-40).

With no evidence of reckless or malicious conduct regarding the failure to obtain the proper insurance policy, the only reasonable conclusion is that the punitive damages were awarded solely on irrelevant evidence. Cincinnati is thereby punished arbitrarily. It is punished for not paying "reasonably" under a policy of insurance at the same time it is held liable in actual damages for not obtaining said policy.

This Court has made the point that there is not an absolute, bright threshold at which punitive damages become excessive,

either in terms of the dollar amount of such damages or at any particular multiple of actual damages. TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993). The Court has resolutely affirmed, however, that the reasonableness of punitive awards "enter[s] into the constitutional calculus." 113 S.Ct. at 2720, quoting Haslip, 499 U.S. at 18. Grossly excessive awards of punitive damages are in substantive violation of the Due Process Clause. Id. Based on the dearth of evidence as to reckless or malicious conduct in failing to obtain the requisite insurance coverage, the award of punitive damages in this case was "grossly excessive." Here, the punitive damages do not bear a reasonable relationship to the compensatory damages. Though the dollar amount of punitive damages was slightly more than twice the actual damages awarded by the jury, the awards were made on mutually exclusive premises. Such a contradiction in the underlying bases precludes any reasonable relationship between compensatory and punitive damages, regardless of the numbers

involved.

There is, moreover, little likelihood of future damage from conduct of the nature for which Cincinnati was found liable. Clearly, there is no incentive for insurance companies or agents to write insurance coverage for wrong addresses. Incorrect information on policies can lead to undercharges of premiums as easily as overcharges. In the case at hand, e.g., Cincinnati was collecting lower premiums on a policy having a coinsurance clause, which OSCO said after the hurricane that it did not want. (R. at 417-423).

The trial court addressed the issue of harm likely to result not from Cincinnati's failure to obtain insurance, but on the irrelevant basis that Cincinnati withheld money due under an insurance contract. It said:

> That is a course of conduct which certainly must be stopped with regard to the insurance industry, and the jury could certainly feel that way that a clear and convincing showing has been made. Mr. Suggs alluded to the problem in his closing argument of what the result would be if we allowed insurance

> companies to just hold onto money for an inordinate period of time that was legitimately due under a claim.

(R. at 983) (emphasis added). The court is thereby justifying the punitive damages award based on a premise in direct conflict with that upon which actual damages were awarded.

E. WHERE THE SOUTH CAROLINA APPELLATE COURTS HAVE FAILED TO CONDUCT A MEANINGFUL REVIEW OF THE PUNITIVE DAMAGE AWARD.

In Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991), the Court stressed as a key procedural component of due process the availability of a meaningful review of punitive damages awards by both the trial and appellate courts. See also Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2335 (1994). The stated purpose of such review is to impose a "sufficiently definite and meaningful constraint on the discretion of the fact finder." Haslip, 499 U.S. at 22.

After the Haslip opinion was issued, the South Carolina Supreme Court addressed the issues of the award and review of

punitive damages. Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991). The South Carolina court construed Haslip very narrowly, stating that while the case held that Alabama's scheme for the award and review of punitive damages met constitutional requirements, it gave no guidance as to whether other procedures were constitutionally sufficient. Gamble, 406 S.E.2d at 353.

The South Carolina Supreme Court, therefore, interpreted Haslip not to require a strong appellate review of punitive awards. It stated:

> The amount of damages, actual or punitive, remains largely within the discretion of the jury, as reviewed by the trial judge. [citations omitted]. We adhere to the precedent that this court's review is limited. . .Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of this court to set aside the award.

Gamble, 406 S.E.2d at 355 (emphasis added). Under South Carolina law, moreover, a trial court abuses its discretion only when it makes an error of law, or when its ruling, based on factual considerations, is without evidentiary support. Fontaine v. Peitz,

354 S.E.2d 565 (S.C. 1987); Renney v. Dobbs House, 274 S.E.2d 290 (S.C. 1981). The phrase "without evidentiary support" has been interpreted by the state supreme court to mean "wholly unsupported by the evidence." Folkens v. Hunt, 387 S.E.2d 265 (S.C. 1990) citing South Carolina Dep't of Highways and Pub. Transp. v. Mooneyham, 269 S.E.2d 329 (S.C. 1980). In the latter case, the state supreme court quoted South Carolina State Highway Dep't v. Clarkson, 226 S.E.2d 696 (S.C. 1976):

> Our prior decisions uniformly hold that the granting or denial of a new trial upon the facts rests within the discretion of the trial judge. Most of our decisions say that such an order is not appealable; some that it is subject to review to determine whether the discretion has been abused. However, regardless of what might appear to be inconsistencies in the statement of the principles governing appellate review of the exercise of the discretion of the trial judge in such matters, the principle consistently applied in all of the cases has been that the decision by the trial judge will not be disturbed unless his finding is wholly unsupported by the evidence, or the conclusion reached has been controlled by an error of law.

South Carolina Dep't of Highways and Pub. Transp. v.

Mooneyham, 269 S.E.2d at 330 (emphasis in Mooneyham). Given the historical meaning of the term "abuse of discretion" regarding factual matters as "wholly unsupported by the evidence," when the South Carolina Supreme Court states in Gamble that punitive damage awards will be set aside only when the trial court's discretion is abused, it is not providing for meaningful appellate review.

In the case at hand, the South Carolina Court of Appeals has virtually rubber-stamped the trial court's order regarding punitive damages. Compare App. at 21-22 with App. at 56-57. Such deference to the trial court's position precludes the meaningful appellate review required by Haslip. While Cincinnati is not constitutionally entitled to a "correct" determination of a punitive damages award, it is constitutionally entitled to the conscientious application of procedures established by this Court to guard against arbitrary and capricious punishment.

II. THE SOUTH CAROLINA COURT OF APPEALS DENIED PETITIONER'S RIGHT TO DUE PROCESS

BY FAILING TO GRANT CINCINNATI A NEW TRIAL WHEN THE JURY'S VERDICT WAS THE PRODUCT OF PASSION, CAPRICE, BIAS OR PREJUDICE AS REFLECTED BY:

A. THE INCONSISTENCY OF THE JURY'S VERDICT

This case went to the jury on three causes of action: breach of contract, bad faith failure to settle, and negligent procurement. The first two causes of action were mutually exclusive from the third, as described supra at pp. 6-7, 15-17.

After the court's initial charge to the jury, Cincinnati objected that the charge failed to instruct the jury as to the mutual exclusivity of the claims. (R. at 913). The court said that he thought the matter was covered, (R. at 913), though it was not. (R. at 876-905). The court did not add any clarification of this matter in its supplementary charge to the jury. (R. at 931-933).

The jury returned verdicts for OSCO in varying amounts for all three causes of action, despite the legal inconsistency of such an award. Under the common law of South Carolina, such

inconsistency is grounds for a new trial. Johnson v. Parker, 303 S.E.2d 95 (S.C. 1983); Prego v. Hobart, 336 S.E.2d 725 (S.C. Ct. App. 1985).

The failure of the court to explain the mutual exclusivity of the claims confused the jury. If the verdicts' inconsistency was the product of confusion by the jury, the court should, under the law of South Carolina, have granted a new trial. In Johnson v. Parker, 303 S.E.2d 95, 97 (S.C. 1983), the state supreme court stated that "when a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial."

B. AN ACTUAL DAMAGES AWARD THAT FAR EXCEEDED THE EVIDENCE

As stated supra, p. 6, the jury returned a verdict of $800,000 for OSCO on the negligence cause of action, far in excess of any testimony regarding actual damages. The award was $204,784 higher than the amount for which the trial court found any reasonable evidence. In point of fact, had the trial court's reliance on OSCO's expert been consistently followed, the verdict

should have been reduced another $200,000 because the witness stated it would be so reduced if OSCO had received a certain loan (which it had). The jury was obviously not constrained by the evidence presented to it. There is clearly a "punitive" aspect to this award of excessive actual damages. A completely arbitrary award of actual damages does not comport with due process. The state supreme court has held that Due Process requires a fair trial before an impartial judge and unprejudiced jury in an atmosphere of judicial calm. State v. Duncan, 238 S.E.2d 204 (S.C. 1977).

Under the law of South Carolina, the trial court was required to grant a new trial absolute if the actual damages award was grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence. Allstate Ins. Co. v. Durham, 431 S.E.2d 557 (S.C. 1993); O'Neal v. Bowles, 431 S.E.2d 555 (S.C. 1993). Here, the trial court and Court of Appeals should, in reviewing the $800,000 award, have realized that some influence outside the evidence informed the

award. The trial court clearly saw that the award was outside the evidence, though he denied that the excessiveness alone was the result of passion, caprice, or prejudice. (App. at 53). The court's knowledge that the $800,000 award was based on an influence outside the evidence should, without more, have caused it to grant a new trial absolute.

Though the trial court did not believe that the excessive actual damages award was the result of passion, caprice, or prejudice, the cumulative actions of the jury should be examined. The jury found liability on all three causes of action; they found that Cincinnati acted "recklessly, wilfully, wantonly, or in conscious disregard for the rights of the Plaintiff," though there was no evidence of such conduct regarding the negligence claim; they returned a grossly excessive actual damages award for negligence, far beyond what any evidence would support; and they deliberated less than an hour to return a $1.6 Million punitive award against Cincinnati. The evidence of passion and prejudice

against Cincinnati by the jury is palpable.

C. OSCO'S COUNSEL BEING ALLOWED TO INFLAME THE COMMUNITY-VERSUS-OUT-OF-STATE-INSURANCE-COMPANYPASSIONS OF THE JURY.

As cited, supra, p. 19, OSCO's president was allowed to testify, over objection, that OSCO was "committed to the community" and manifested that commitment by a multitude of "voluntary, donated" activities to support various community organizations. OSCO's counsel also argued this "evidence" in his closing to the jury, supra, at pp. 19-20, stating that OSCO was part of "this community," i.e., the same community as members of the jury. The finale of his closing argument, was "give this community back [the] Orangeburg Sausage Company." Supra at p. 20.

This "evidence," and the argument based upon it, are devoid of any probative value as to any liability of Cincinnati or as to any damages to OSCO. Their only purpose is to appeal to the self-interest and parochial prejudice of the jury.

Arguments that appeal to the local bias of a jury are improper under South Carolina law. Norris v. Ferre, 432 S.E.2d 491 (S.C. Ct. App. 1993). The probability of prejudice from arguments to local bias are far greater in the case at hand than they were in Norris v. Ferre, in which comments were addressed to the place of residence of expert witnesses. 432 S.E.2d at 493. Here, the arguments to bias were directly addressed to seek the jury's favor for the local party, OSCO. Cincinnati was thereby directly prejudiced. This argument to local bias exacerbated the latent prejudice, recognized by this Court, Honda Motor Co. v. Oberg, 114 S.Ct. at 2340-41, and Haslip, 499 U.S. at 22, that exists against large businesses with "deep pockets." The introduction of the "dedicated-to-community evidence" and the use of such evidence in closing argument, especially the finale thereof, manifests a calculated, intentional appeal to local bias.

CONCLUSION

This is a case anticipated by the Court in Honda Motor Co.

v. Oberg. Here, a local jury used its verdicts to express its bias against a big business without a strong local presence. The latent seed of bias was brought into full flower by counsel for OSCO. Both the verdicts for actual damages and punitive damages are manifestations of this bias. The trial and appellate courts made errors of law that allowed the expression of such bias. Cincinnati has thereby been deprived of its right to due process.

A Writ of Certiorari should issue to review the holding of the South Carolina Court of Appeals in this case.

Respectfully submitted,

BY:

William O. Sweeny, III
Sweeny, Wingate, Murphy & Barrow, P.A.
1301 Gervais Street, Suite 500
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

Attorneys for Petitioner